

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**MITCHELL CASE, a minor, by his
parents, Dustin and Elizabeth Case,)
Plaintiff,) 2:07-cv-374
v.)
ALLEGHENY INTERMEDIATE UNIT,)
Defendant.)**

MEMORANDUM ORDER

Before the Court for consideration and disposition is PLAINTIFF'S MOTION TO ENFORCE PENDENCY UNDER THE IDEA (Document No. 4). Plaintiffs filed a brief in support, Defendants filed a brief in opposition and Plaintiffs filed a reply brief (Document Nos. 5, 8, 11). The Court entertained oral argument on June 27, 2007. The matter is ripe for resolution.

Background

This case involves the services to be provided under the Individuals with Disabilities Education Act (IDEA) to a three-year-old boy with cerebral palsy. When a child turns three, he must transition from Part C of the IDEA, which provides services through the Infants and Toddlers Early Intervention program administered by the County Office of Mental Health and Mental Retardation, to Part B of IDEA, a Preschool Early Intervention program which is operated in this case by Defendant, the Allegheny Intermediate Unit (AIU). The child received Conductive Education as part of his Individualized Family Service Plan (IFSP) that applied for

ages 0-3. The family and the AIU disagree as to whether the child is entitled to continue to receive Conductive Education services as part of his Part B Individualized Education Plan (IEP). The AIU refused to provide such services, a decision that was upheld by a Hearing Officer in an opinion dated December 22, 2006. The question now before the Court is very narrow: Is the AIU required to provide Conductive Education during the pendency of this litigation?

Discussion

Plaintiffs contend that the “stay-put” provision of IDEA, 20 U.S.C. § 1415(j), mandates that the AIU continue to provide Conductive Education to the child during the pendency of the dispute. In *Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181 (3d Cir. 2005), the United States Court of Appeals for the Third Circuit addressed this precise question under extremely similar facts. The Court concludes that *Pardini* is controlling.

In *Pardini*, the Court held that the AIU is required to provide Conductive Education until the dispute is “ultimately resolved.” *Id.* at 190 (citing *Drinker v. Colonial School Dist.*, 78 F.3d 859, 865 (3d Cir. 1996)). In *Ringwood Board of Educ. v. K.H.J.*, 469 F. Supp.2d 267, 270 (D.N.J. 2006), the district court explained that the term “ultimately resolved” means that the pendent program must be maintained until the dispute reaches a final conclusion, including appeals. The *Pardini* Court explained that its decision was based on the plain language of the IDEA and was consistent with Congress’ intent to ensure a “smooth transition” from Part C to Part B services. 420 F.3d at 186, 191. The “stay-put” provision applies regardless of whether the case is substantively meritorious. *Id.* at 190.

The AIU argues that *Pardini* is distinguishable on the basis that the parties in this case

agreed upon and have implemented an IEP. The Court does not agree, either factually and legally. The Court finds that the parents did not consent to an IEP that did not include Conductive Education. To the contrary, although the parents accepted those provisions of a proposed IEP on which there was no dispute, they were careful at every stage of the process to explicitly preserve their objection as to their insistence for Conductive Education. *See, e.g.*, Letter from Jeffrey Ruder dated January 15, 2007. It would be wholly contrary to the statutory intent of the IDEA to require parents to forego all necessary services in order to preserve their right to appeal. Moreover, in *Pardini*, the Court of Appeals defined the pendent program as the “operative placement actually functioning at the time the dispute first arises.” 420 F.3d at 192 (citation omitted). It is undisputed that the child was receiving Conductive Education as part of his IFSP at the time the dispute over his transitional IEP program first arose. Thus, as in *Pardini*, the “operative placement consisted of the services [he] was receiving under [his] IFSP.” *Id.*

Defendant challenged the procedural validity of the Motion to Enforce Pendency in its brief, contending that Plaintiffs must meet the standard for injunctive relief, although it did not actively pursue that objection during oral argument. This contention has been rejected by *Pardini*, which criticized the district court for applying an injunction analysis rather than enforcing the IDEA’s stay-put provision. *Id.* at 188. The Court explained that Congress has already balanced the competing equities and that IDEA “substitutes an absolute rule in favor of the status quo for the court’s discretionary consideration of the [preliminary injunction] factors.” *Id.* Thus, the Motion to Enforce Pendency is functionally equivalent to a motion for injunctive

relief, although it need not meet the traditional test.¹

Conclusion

AND NOW, in accordance with the foregoing, it is hereby **ORDERED**, **ADJUDGED and DECREED** that PLAINTIFF'S MOTION TO ENFORCE PENDENCY UNDER THE IDEA (Document No. 4) is **GRANTED**. The AIU is directed to provide Conductive Education services to the child until this litigation has been ultimately resolved or further order of court. The AIU is further directed to reimburse Plaintiffs for all reasonable costs which they have incurred since implementation of the IEP to continue the provision of the Conduction Education services contained in the IFSP.

SO ORDERED this 28th day of June, 2007.

BY THE COURT:

s/ Terrence F. McVerry
United States District Court Judge

cc:

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¹The parties vigorously debate the applicability of a relatively recent regulation, 34 C.F.R. § 300.518(c). The Court need not resolve this dispute for the purpose of the instant motion.